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**PD-0963-19**

**In the Texas Court of Criminal Appeals**

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COURT OF CRIMINAL APPEALS
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# Harry Donald Nicholson, Jr.

*Petitioner-Appellant*

vs.

# The State of Texas

*Respondent-Appellee*

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From the Tenth Court of Appeals,
Case 10-18-00360-CR

Appeal from the Thirteenth District Court
in Navarro County, Case D37996-CR

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# Petitioner-Appellant's Reply Brief

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## Reply

### 1. The evading-arrest statute's plain language is not ambiguous and does not lead to absurd results.

A person commits the criminal offense of evading arrest or detention if he "intentionally flees from a person he knows is a peace officer or federal special investigator attempting *lawfully* to arrest or detain him." Tex. Pen. Code § 38.04 (emphasis added). In Harry Nicholson, Jr.'s initial brief, he thus urged this Court that the plain language of the statute requires proof of an accused's knowledge that the attempted arrest or detention was lawful. The statute requires proof of knowledge of the words on both sides of "lawfully." *See, e.g., Duvall v. State*, 367 S.W.3d 509, 511 (Tex. App.—Texarkana 2012, pet. ref'd). And "[l]awfully" is not set off by any punctuation. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 256 (2012). In short, the State's aversion to detained people "play[ing] lawyer" does not justify reading the statute as requiring knowledge of all but one word embedded within a phrase. *See* RR13: 32; *see, e.g., Ex parte Levinson*, 274 S.W.2d 76, 78 (1955) ("It must be kept in mind, also, that in construing a statute or in seeking to ascertain the

legislative intent in enacting a statute, the courts must not enter the field of legislation and write, rewrite, change, or add to a law.").

In its brief in response, the State argues that the statute's plain language is ambiguous and that, unless this Court pretends that "lawfully" is in parentheses, the language leads to absurd results that the legislature could not have possibly intended. *See, e.g., Chiarini v. State*, 442 S.W.3d 318, 320 (Tex. Crim. App. 2014) (explaining that in construing a statute, this Court gives effect to its literal text unless the meaning of the statute is ambiguous or the plain meaning leads to absurd results). On both points, the State is incorrect.

**a. "[Who] he knows is a peace officer or federal investigator" cannot be a restrictive clause unto itself, and that alternative punctuation can be imagined does not mean language is ambiguous.**

The State argues that the statute's plain language is "structurally ambiguous" because it lends itself to two alternative readings. First, the State argues that the phrase "attempting lawfully to arrest or detain him" could modify only "person" because "[t]he phrase '[who] he knows is a peace officer or federal investigator' could be a restrictive clause into itself." St. Br. at 10. Thus, the State suggests, the statute might *really* say that a person commits an offense if he intentionally flees from

a person attempting lawfully to arrest or detain him and he knows the person is a peace officer or federal investigator.

The State offers no theory for why, if the legislature meant this, it did not write this. In any event, though, we know that the statute cannot mean this because, as the State acknowledges, under that reading of the statute, there also would be no required showing of knowledge of an attempted arrest or detention (St. Br. at 10)—an essential element of the offense. *See, e.g., Duvall*, 367 S.W.3d at 511 ("A defendant's knowledge that a police officer is trying to arrest or detain him or her is an essential element of the offense of evading arrest."); *Griego v. State*, 345 S.W.3d 742, 749–50 (Tex. App.—Amarillo 2011, no pet.) ("For a defendant to be found guilty of evading arrest or detention, 'it is essential that a defendant know the peace officer is attempting to arrest him.'") (quoting *Jackson v. State*, 718 S.W.2d 724, 726 (Tex. Crim. App. 1986)); *Redwine v. State*, 305 S.W.3d 360, 362 (Tex. App.—Houston [14th Dist.] 2010, pet ref'd) (noting that a person commits the offense of evading arrest or detention only if the person "knows a police officer is attempting to arrest him but nevertheless refuses to yield to a police show of authority"); *Thompson v. State*, 426 S.W.3d 206, 209 (Tex.

App.—Houston [1st Dist.] 2012, pet. ref'd) ("A person commits a crime under section 38.04 only if he knows that a police officer is attempting to arrest him….") (citing *Hobyl v. State*, 152 S.W.3d 624, 627 (Tex. App.—Houston [1st Dist.] 2004, pet. dism'd) ("[T]he accused must know that the person from whom he flees is a peace officer attempting to arrest or detain him.")). And indeed, the State never urges this Court that its first alternative reading is how this Court *should* read the statute.

The State does urge this Court to adopt its second alternative reading. Characterizing it as "syntactically unusual" for the statute to read "attempting lawfully to arrest or detain him" rather than "lawfully attempting to arrest or detain him," the State argues that a reader could simply pretend that "lawfully" is in parentheses. St. Br. at 10-11. Of course, that, in fact, lawfully is not punctuated this way "militates against [this] construction." *Ludwig v. State*, 931 S.W.2d 239, 242 (Tex. Crim. App. 1996). And "the meaning of a statute will typically heed the commands of its punctuation." *U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993); *see also, e.g., Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016) ("Based on the statute's

language and punctuation, we conclude that the TCPA requires an award of 'reasonable attorney's fees' to the successful movant."); *In re Bateman*, 515 F.3d 272, 277 (4th Cir. 2008) (affirming an interpretation of a statute that "gives effect to the logical sequence of the language used… All words are given effect. No punctuation needs to be added or deleted."). Moreover, as the State acknowledges, "syntactically unusual" is not syntactically wrong. *See* St. Br. at 11 n. 38. Even if it were, though, there would be no reason for this Court to "fix" the statute by imagining parentheses. *See Texas Lottery Com'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 637–38 (Tex. 2010) ("Even when it appears the Legislature may have made a mistake, courts are not empowered to 'fix' the mistake by disregarding direct and clear statutory language that does not create an absurdity.") (citing *Brown v. De La Cruz*, 156 S.W.3d 560, 566 (Tex. 2004)); *Mitchell v. State*, 473 S.W.3d 503, 512 (Tex. App.—El Paso 2015, no pet.) ("Therefore, even when it appears theoretically possible that the Legislature may have made a mistake when it selected certain language in a statute, courts are not empowered to 'fix' any such mistakes by disregarding direct and clear statutory language, as long as doing so does not create an absurd

result."). Neither alternative reading floated by the State is therefore plausible. The statute is not ambiguous.

**b. Imagining parentheses is not necessary to avoid absurd results.**

The State further contends that, even if the statute's plain language is not ambiguous, a faithful construction of the statute would lead to "radical," even "absurd" results because it would "render[ ] the statute ineffectual." St. Br. at 17, 22. Again echoing its comments at trial,[1] the State claims that, "[w]ith rare exception, knowing one's attempted arrest or detention is lawful will require familiarity" with "working knowledge of legal standards…." St. Br. at 17-18. And because "lawfulness frequently turns on the facts that officers base their decisions on," the State complains that it will "not [be] easily proven." St. Br. at 19. "[E]xcept for [in] extreme cases (like flight after the existence of an arrest warrant has been revealed or the suspect has committed a violent crime in the officer's presence)," the State argues it "will be unable to prove most cases of evading." St. Br. at 20.

[1] "The defendant doesn't have to know that the officer lawfully tried to arrest him. The defendant doesn't get to play lawyer. He doesn't get to say, awe, well, you haven't read me my rights yet, or you haven't done this yet, or whatever yet so I get to run from you and it's not fleeing." RR13: 32.

But the bar for concluding a plain-language interpretation of a statute leads to absurd results "is high[ ] and should be." *Combs v. Health Care Services Corp.*, 401 S.W.3d 623, 630 (Tex. 2013). "The absurdity safety valve is reserved for truly exceptional cases, and mere oddity does not equal absurdity." *Id*. Unintended, improvident, inequitable, over-inclusive, or under-inclusive consequences of a statute are not absurd results. *Id*. And again, even if it appears theoretically possible that the Legislature may have made a mistake when it provided that "[a] person commits an offense if he intentionally flees from a person he knows is a peace officer or federal special investigator attempting lawfully to arrest or detain him," courts are not empowered to "fix" mistakes by disregarding direct and clear statutory language unless the language creates an absurd result. *Mitchell*, 473 S.W.3d at 512. In short, this Court should find that the statute's plain language leads to absurd results only if it finds that "it was quite impossible that a rational Legislature could have intended it." *Combs*, 401 S.W.3d at 631.

Here, the statute's plain language does not lead to absurd results. First, the State exaggerates its burden under the plain language of the

statute. As the State acknowledges in its response to Issue Two, a jury can infer a defendant's "knowledge of the lawfulness of his detention or arrest based on a series of reasonable inferences from the evidence." St. Br. at 26 (citing *Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007) (permitting inference stacking under *Jackson v. Virginia*, 443 U.S. 307 (1979))). So here, for example, if the State had shown that Nicholson knew he missed a court appearance and that doing so could lead to a warrant being issued, a jury could infer that he knew that the attempted detention was lawful. St. Br. at 26-27. In other contexts, the State could present evidence that, just prior to an attempted arrest or detention, a defendant committed a serious crime (not Class C littering). And of course, an officer could simply announce the basis for the arrest or detention.

As to this last alternative, the State notes that under Section 9.51(b) of the Penal Code, "only non-peace officers are generally required to provide reason for arrest before using force to effect it," and "even then provision is made for when the reason 'cannot reasonably be made known to the person to be arrested.'" St. Br. at 19 n. 64 (quoting Tex. Pen. Code § 9.51(b)). But the plain language of the evading-arrest

statute does not conflict with this. Police officers are not required to provide a reason for arrest before using force to effect it—an attempted arrestee just is not guilty of evading arrest if he non-violently flees an apparently unlawful detention.

Even if the plain language of the statute were burdensome to the State, however, that does not render the language's results absurd. Interpreting Article 44.01 of the Code of Criminal Procedure, for example, setting out when the State is entitled to appeal a court order, this Court "recognize[d] that the statute place[d] a significant burden on the prosecuting attorney." *State v. Muller*, 829 S.W.2d 805, 810–11 (Tex. Crim. App. 1992). But that did not make the statute "so absurd that it could not have possibly been contemplated by the legislature." *Id.* Similarly, the San Antonio Court of Appeals concluded that while Section 101.106 of the Texas Civil Practice and Remedies Code "frustrat[ed]" plaintiffs and appeared unjust, it could not "agree that the language of the statute leads to an absurd result." *Univ. of Texas Health Sci. Ctr. at San Antonio v. Webber-Eells*, 327 S.W.3d 233, 243 (Tex. App.—San Antonio 2010, no pet.). "[A]ny argument regarding language that might be more just would have to be directed to the Legislature,

not the judiciary." *Id.*; *see also In re Watson*, 332 B.R. 740, 745 (Bankr. E.D. Va. 2005) ("…while the result of interpreting Section 109(h)(3)(A) using the Plain Meaning Rule may produce an unpopular and perhaps even burdensome result, this Court is not the forum in which to seek a remedy; the proper venue instead lies with Congress.").

Second, it's entirely possible that the legislature intended to permit a person to flee if he has no reason to believe he is being lawfully arrested or detained. It's useful here to compare the related offense of resisting arrest. *See* Tex. Pen. Code § 38.03. Under current Texas law, a person may not use force to prevent or obstruct an arrest, search, or transportation, regardless of whether the arrest or search was unlawful or what the person believed. *See id*. But contrary to the State's claim in its brief, this is a relatively recent development. *See* St. Br. at 12 n. 43 ("Physical force has always been prohibited."). The right to physically resist an unlawful arrest has existed at common law for over 300 years, and its origins can be traced to the Magna Carta. Craig Hemmens, *Resisting Unlawful Arrest in Mississippi: Resisting the Modern Trend*, 2 Cal. Crim. L. Rev. 2, 6 (2000). American courts in the nineteenth and early twentieth century allowed the use of whatever force was

"absolutely necessary to repel the assault constituting the attempt to arrest." *Bad Elk v. United States*, 177 U.S. 529, 535 (1900). And in 1948, the Supreme Court remarked that "[o]ne has an undoubted right to resist an unlawful arrest, and courts will uphold the right of resistance in proper cases." *United States v. Di Re*, 332 U.S. 581, 594–95 (1948). As late as 1968, one Supreme Court justice, in dissenting to the dismissal of the writ of certiorari, referred to the common law right as still viable. *Wainwright v. New Orleans*, 392 U.S. 598, 613–14 (1968) (Douglas, J., dissenting).

Against this historic backdrop, it's not at all absurd to think that the legislature, though no longer allowing for the use of force in fleeing unlawful detentions, intended to allow for non-violent fleeing of apparently unlawful detentions. And it's not absurd when remembering that "[t]he liberty of the citizen…. is one of the fundamental purposes proposed to be subserved by the organization of society and government." *Gilbert v. State*, 181 S.W. 200, 202 (1915) (quoting *Alford v. State*, 1880 WL 9057, at *6 (Tex. App. 1880, no pet.)). Indeed, "[i]ndividual liberty and freedom are the great ideas upon which our political fabric is founded, and for the promotion and protection of which

our laws are enacted." *Alford*, 1880 WL 9057, at *8. And of course, both our federal and state constitutions "exist to advance two purposes: individual liberty through limited government." *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 120 (Tex. 2015) (Willett, J., concurring).

In sum, it's not "quite impossible" that the legislature meant what it said in enacting the evading-arrest statute. *See Combs*, 401 S.W.3d at 631. And because what it said is not ambiguous, the statute's plain language is thus where the analysis begins and ends. The evading-arrest statute requires proof of knowledge that the attempted arrest or detention is lawful.

**2. There is insufficient evidence that Nicholson knew he was being lawfully detained.**

In Nicholson's second issue in his initial brief, he further explained that abiding by the evading-arrest statute's plain language matters in this case because the evidence is legally insufficient to show that he knew he was being lawfully detained. Though the court of appeals reasoned that, at the time of the attempted detention, Nicholson had committed at least four crimes—"littering, fail[ing] to present a valid Texas driver's license, [ ] outstanding warrants," and

"possess[ing] contraband in the form of glass pipes that are usually used in the consumption of drugs"—the glass pipes were found inside the center console of the vehicle and not until after Nicholson's ultimate arrest. *See Nicholson v. State*, No. 10-18-00359-CR, 2019 WL 4203673, at *6 (Tex. App.—Waco Sept. 4, 2019, no pet. h.) at *6; RR12: 135-36. The State presented no evidence that Nicholson knew there were warrants out for his arrest. *See* RR12: 65-66. And although Nicholson did not have his driver's license, he gave Officer Layfield his license number, and Officer Layfield confirmed that Nicholson had a valid license. RR12: 21, 80. The only obvious basis for detention thus would have been littering, and a person is not likely to expect to be warrantlessly arrested for Class C-misdemeanor littering. *See* Tex. Code Crim. Pro. art. 14.06(b). And in fact, Officer Layfield was not attempting to detain Nicholson for littering—he was attempting to detain him on the basis of the outstanding warrants. RR12: 65.

In its brief in response, the State concedes "that the paraphernalia possession was unknown to police at the time he fled and should not be factored into sufficiency." St. Br. at 28 n. 87. But the State argues that there was ample evidence Nicholson knew there were warrants for his

arrest. St. Br. at 26-28. And the State argues that Nicholson "knew he had been littering and failed to present his driver's license to the officer on request." St. Br. at 28.

Had the State actually shown that Nicholson knew there were warrants out for his arrest—had the State called his bail bondsman or a court coordinator, for example—the sufficiency analysis might be different. As set out in Nicholson's reply to the previous issue, that's one of the many non-burdensome, non-impossible ways for the State to prove a defendant's guilt under the plain language of the statute. But the State did not prove that Nicholson knew there were warrants out for his arrest.

In arguing otherwise, the State notes that "[o]ne of the warrants (a capias [out of Zandt County])" indicated that Nicholson "missed a court appearance." St. Br. at 26. Because "the address on the capias is the same" as the one Nicholson gave Officer Layfield, the State claims that Nicholson "likely" knew of the appearance and understood that missing it "could lead to a warrant being issued." St. Br. at 26-27.

Maybe the capias would allow a jury to speculate as much. It's "likely" Nicholson knew of the appearance and understood that missing

it could lead to a warrant being issued, maybe. But "[a] conclusion reached by speculation"—though it "may not be completely unreasonable"—is "not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt." *Hooper*, 214 S.W.3d at 16. Similarly, it is entirely speculative to suggest that, prior to the attempted unexplained detention, Nicholson could hear the police dispatch relay that there were warrants out for his arrest. *See* St. Br. at 27-28. As the State concedes, it is "difficult to make out over the sound of [Nicholson's] engine" even on Officer Layfield's bodycam. St. Br. at 27-28 (citing SX10 at 22:25:52 to 22:26:00). And Nicholson's "attempts to dissuade the officer from handcuffing him and then ultimately fleeing," while perhaps allowing for speculation that he knew he was "good for it" also supports just the opposite, and for what the legislature provided: that he was fleeing an apparently unlawful arrest or detention. *See* St. Br. at 28.

Nicholson's post-arrest jail calls with his mother do not suggest otherwise. *See* St. Br. at 27. Yes, Nicholson's mother said, "If you'd have just gone to the courthouse up there in Van Zandt and gotten that over with, you wouldn't be in this situation." And yes, Nicholson responded,

"I would have been in jail." St. Br. at 27 (quoting SX31 at 2:15). But that shows only that he knew then, *after* being arrested, that there had been a warrant out for his arrest.

As to Nicholson providing his valid driver's license number instead of his physical driver's license and apparent littering, the State claims that his "possible ignorance that the law has criminalized this conduct should not excuse him in this context any more than it would in any other." St. Br. at 28. On these bases, too, then, the State claims it showed Nicholson knew he was being lawfully detained. But it's not about ignorance that the law has criminalized this conduct. It's about the accurate understanding that people generally don't get arrested for these offenses. Again, Article 14.06 of the Code of Criminal Procedure explicitly provides for a citation to be issued. *See* Tex. Code Crim. Pro. art. 14.06(b) ("A peace officer who is charging a person, including a child, with committing an offense that is a Class C misdemeanor, other than an offense under Section 49.02, Penal Code, may, instead of taking the person before a magistrate, issue a citation to the person…."). And again, Officer Layfield was not attempting to detain Nicholson for littering—he was attempting to detain him on the basis of the

outstanding warrants. RR12: 65. And as the State acknowledges, Nicholson "knew the officer had not written a citation or given him a warning for these offenses." St. Br. at 28.

The State easily could have attempted to show that Nicholson knew he had missed a court appearance, that this could lead to a warrant being issued, and, thus, that he was being lawfully arrested. Again, all the State would have had to do was call a bail bondsman or an official with the Van Zandt court. But because the State did not think the evading-arrest statute's plain language meant what it said, the State didn't. And as a result, the evidence the State presented allows only for speculation that Nicholson knew he was being lawfully detained.

It matters, then, that the plain language of the evading-arrest statute requires proof of knowledge that the attempted arrest or detention is lawful. Because even "a strong suspicion of guilt does not equate with legally sufficient evidence of guilt," the evidence was insufficient to prove beyond a reasonable doubt that Nicholson was guilty of evading arrest. *Winfrey v. State*, 393 S.W.3d 763, 769 (Tex. Crim. App. 2013). He again respectfully requests this Court reverse the

lower courts' judgments and render a judgment of acquittal. *See Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004); *Greene v. Massey*, 437 U.S. 19 (1978).

### 3. Conclusion

Nicholson respectfully requests this Court reverse the lower courts' judgments and enter a judgment of acquittal.

Respectfully submitted,

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